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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1229

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN,
TRUSTEE IN BANKRUPTCY),

Petitioner,

vs.

NORTH ALABAMA EXPRESS, INC., ET AL.,

Respondents.

RESPONDENTS' REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

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Dated: March 30th, 1979

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This case involves a continuing effort by the petitioner to defeat or evade the specific statutory standards of 49 U.S.C.A. § 307 requiring proof of "the present or future public convenience and necessity" by applying the relaxed Elliott Doctrine (*C & D Motor Delivery Co.—Purchase—Elliott*, 38 M.C.C. 547, 553 (1942), see App. A, pp. 10-11) which holds that a Section 307 application may be supported by the intrastate carrier's past record. As noted by the Fifth Circuit (A-11):

"Thus, the burden on the applying transferee is made significantly less difficult and his chances of success in obtaining interstate authority are enhanced."

1. This Reply is filed on behalf of the following respondents, each of whom was a protestant throughout the Commission proceedings and petitioners in the United States Court of Appeals for the Fifth Circuit: Bowman Transportation, Inc., Georgia-Florida-Alabama Transportation Company, Floyd & Beasley Transfer Company, Inc., Hiller Truck Lines, Inc., North Alabama Express, Inc., and Bee-Line Express, Inc.

The Trustee petitioner held only an interstate certificate based upon registration of its Alabama intrastate certificate under 49 U.S.C. § 306(a) (7) (A).

In this proceeding, the Trustee proposed to split and divide the registered certificate among four multi-state carriers. Each sought to receive authority between Birmingham and their selected parts in Alabama. The Trustee entered into four separate but similar contracts, each being conditioned upon approval of the Interstate Commerce Commission (ICC) and the Alabama Public Service Commission (APSC). The proposed split and transfer of the Alabama intrastate certificate was denied by the Alabama Commission. The denial was affirmed by the Alabama Supreme Court (*Alabama Public Service Commission, et al. v. Cooper Transfer Co., Inc., et al.*, 295 Ala. 209, 326 So.2d 283). After the interstate hearings were concluded, the parties materially amended their contracts to eliminate the required approval of the APSC and subsequently surrendered the intrastate certificate for cancellation. The Fifth Circuit held that the statute (49 U.S.C.A. § 306(a) (7) (A)) means what it says, i.e., a certificate of registration "may not be transferred apart from the transfer of the corresponding intrastate certificate".

The subject Petition for Certiorari was filed only by the proposed vendor of the registered certificate. Neither the ICC nor any of the proposed vendees have joined or endorsed the position here argued by the petitioner.

Following remand, the ICC noted that (App. D, p. 14):

"The Court's (5th Circuit) judgment does give the Commission some flexibility as to the timing and manner of disposition of the 'directly-related' Section 207 applications. Thus the Commission could entertain

a request to treat the Section 207 applications as new (independent) Section 207 applications, republish them as such, and set the matter for further hearing. But no Section 207 applicant has made such a request. Moreover the record is quite stale and we believe that the matter can best be handled in new Section 207 proceedings."

The petitioner has filed a supplemental brief discussing this decision of the Commission, arguing that the ICC entered a "final order approving the issuance of interstate authority to A-OK's successors several months prior to the cancellation by the State Commission of A-OK's intrastate authority" (Suppl. Br., p. 3). What the petitioner neglected to note was that:

—The Order of the ICC was vacated by the Fifth Circuit, and

—The Commission correctly noted in its Order served March 5, 1939 that (App. B, p. 8):

"Accordingly, Division 3 had no authority under the Commission's own organizational structure at that time to consider the Section 207 applications since they were not 'directly related' to a valid proposal under Section 5(2)—the only circumstance under which Division 3 could consider Section 207 applications."

The respondents have previously noted, and the Commission has affirmed in its Order served March 5, 1979, that the applicants have readily available:

- (1) "A request to treat the Section 207 applications as new (independent) Section 207 applications, republish them as such and set the matter for further hearing". But, as noted, the applicants have made no such request to the Commission.

- (2) They could file applications for emergency temporary authority (ETA) and for temporary authority (TA) under 49 U.S.C.A. Section 310a. If there is an immediate and urgent need for service, the Commission can grant authority under this section "without hearings or other proceedings".
- (3) They can file Section 207 applications. The Commission stated that "the record is quite stale and we believe that the matter can best be handled in new Section 207 proceedings."

Contrary to the petitioner's argument, the ICC has not held that the Trustee lost any of his alleged assets. Applying the specific language of 49 U.S.C. Section 306 (a) (7) (A), the Fifth Circuit held that a certificate of registration "cannot be transferred apart from the transfer of the corresponding intrastate certificate" upon which the registration was based.

We are at a loss to comprehend how the decision in *County of Marin v. United States*, 356 U.S. 412, 2 L.Ed.2d 879, 78 S.Ct. 880, can possibly afford any support to petitioner's position (See Reply Br., p. 14).

Finally, the decision of the Fifth Circuit did not, as petitioner suggests, affect the right of any division of the Commission to "hear and determine" all matters referred to them. It simply correctly held that:

"Division 3 lacks authority to decide Section 207 applications where they are not 'directly related' to a Section 5 transfer application." (A-16)

And the Commission, to like effect, stated in its Order served March 5, 1979 (App. D, p. 8):

"Accordingly, Division 3 had no authority under the Commission's own organizational structure at that time

to consider the Section 207 applications since they were not 'directly related' to a valid proposal under Section 5(2)—the only circumstance under which Division 3 could consider Section 207 applications."

Thus, the Fifth Circuit and the Commission held that a division of the Commission cannot determine matters which have not been delegated to the division by the Commission. In short, a division cannot usurp the powers of the full Commission or decide matters not delegated to it.

Respectfully submitted,

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Dated: March 30th, 1979